

**Toombs Truck & Equipment Co. and International
Union of Operating Engineers, Local 18, AFL-
CIO-CLC. Case 9-CA-28547**

January 22, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

Upon a charge and an amended charge filed by the Charging Party (the Union) on May 10 and June 13, 1991,¹ respectively, the General Counsel of the National Labor Relations Board issued a complaint against Toombs Truck & Equipment Company (the Respondent) on June 19, alleging that it violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act. The Respondent filed an answer to the complaint on July 5, but withdrew it by letter on October 10. Thus, the complaint is unanswered.

On October 21, the General Counsel filed a Motion for Summary Judgment. On October 30, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause by November 13 why the motion should not be granted. The Respondent has not filed a response to the Notice to Show Cause. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the General Counsel's memorandum in support of his Motion for Summary Judgment disclose that the Respondent withdrew its answer with the understanding that a Motion for Summary Judgment would be filed with the Board. The Respondent's withdrawal of its answer has the same effect as failure to file an answer.² Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

¹ All dates are between November 23, 1990, and November 13, 1991, inclusive, unless otherwise stated.

² *Maislin Transport*, 274 NLRB 529 (1985).

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a corporation with an office and place of business in Columbus, Ohio, has been engaged in the commercial sale, lease, and maintenance of digger-derrick trucks and related equipment. During the 12-month period prior to the issuance of the complaint, the Respondent, in the course and conduct of its business, purchased and received at its Columbus facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since 1975, and at all material times, the Union has been recognized by the Respondent as the designated exclusive collective-bargaining representative of the Respondent's employees in the following unit, which is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All mechanics, helpers, and partsmen employed by [the Respondent] at its 1800 Walcutt Street, Columbus, Ohio facility, excluding all office clerical employees, guards and supervisors as defined in the Act, and all part-time high school student workers.

Recognition of the Union has been embodied in successive collective-bargaining agreements, the most recent of which was for the period May 30, 1988, to April 30, 1991. At all times since 1975, the Union, by virtue of Section 9(a) of the Act has been, and is, the exclusive representative of the unit employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The Respondent has failed and refused to bargain with the Union, as the exclusive collective-bargaining representative of the unit, by refusing to adhere to the terms of the May 30, 1988-April 30, 1991 collective-bargaining agreement (the agreement) and by repudiating its obligations under the agreement. Specifically:

(a) Since about May 1, 1990, but unknown to the Union until January 28, failing and refusing to pay contributions to the Central Pension Fund of the Union pursuant to section 18.2 of the agreement.

(b) Since about November 23, failing and refusing to pay employees holiday pay for the day after Thanksgiving pursuant to section 15.1 of the agreement.

(c) Since about November 28, and continuing thereafter, failing and refusing to abide by and comply with the grievance and arbitration provisions set forth in article 8 of the agreement.

(d) Since about December 24, failing and refusing to pay employees holiday pay for the day before Christmas pursuant to section 15.1 of the agreement.

(e) Since about January 1, failing and refusing to deduct money designated by employees for IRA contributions and to remit those moneys to the designated bank, as required by section 18.1 of the agreement.

(f) Since about January 1, failing and refusing to deduct and remit dues to the Union pursuant to article 3 of the agreement.

(g) Since about January 23, failing and refusing to pay a tool allowance to employees, pursuant to section 10.8 of the agreement.

(h) Since about January 23, failing and refusing to pay weekly sick benefits to its employees as required by section 17.3 of the agreement.

(i) Since about February 22, failing and refusing to pay personal and earned vacation pay to employees as required by articles 15.1 and 16.3 of the agreement, respectively.

The Respondent, without giving the Union advance notice or an opportunity to bargain, and without the Union's consent (1) about January 1 promulgated (by posting) (a) a policy establishing a starting time for employees and penalties for tardiness, and (b) a personnel manual establishing policies with respect to wages, hours, vacations, holidays, insurance, discipline, substance abuse, and other terms and conditions of employment of employees in the unit; and (2) commencing about January 1, required prospective employees as a condition of hire to sign a form titled Specific Conditions for Employment, agreeing to observe specific rules, regulations, and conditions of employment. The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of bargaining.

About May 30, and at all times thereafter, the Respondent has demanded that the Union agree to submit to a poll to establish its majority status, as a condition of negotiating a new collective-bargaining agreement.

We find that by engaging in the above specified acts the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the Union as the representative of

the employees in the unit, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to adhere to the terms of the May 30, 1988–April 30, 1991 collective-bargaining agreement and by repudiating its obligations under the agreement, including (1) failing and refusing to pay (a) contributions to the Central Pension Fund of the Union pursuant to section 18.2 of the agreement, (b) holiday pay for the day after Thanksgiving and the day before Christmas, pursuant to section 15.1 of the agreement, (c) a tool allowance to employees, pursuant to section 10.8 of the agreement, (d) weekly sick benefits to its employees as required by section 17.3 of the agreement, and (e) personal and earned vacation pay to its employees as required by articles 15.1 and 16.3 of the agreement, respectively; and (2) failing and refusing (a) to abide by and comply with the grievance and arbitration provisions set forth in article 8 of the agreement, (b) to deduct money designated by employees for IRA contributions and remit those moneys to the designated bank, as required by section 18.1 of the agreement, and (c) to deduct and remit dues to the Union pursuant to article 3 of the agreement, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

2. By unilaterally, and without providing the Union with advance notice or an opportunity to bargain, promulgating (1) a policy establishing a starting time for employees and penalties for tardiness, (2) a personnel manual establishing policies with respect to wages, hours, vacations, holidays, insurance, discipline, substance abuse, and other terms and conditions of employment of employees in the unit, and (3) a requirement that prospective employees sign, as a condition of hire, a form titled Specific Conditions for Employment, agreeing to observe specific rules, regulations, and conditions of employment, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

3. By demanding that the Union agree to submit to a poll to establish its majority status, as a condition of negotiating a new collective-bargaining agreement, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

4. The above specified unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to remit all pension fund contributions required by the agreement.³ This shall include making all employees whole for any loss of pension fund credits or benefits resulting from the Respondent's failure to make required pension fund contributions.⁴ This shall also include reimbursing employees for any contributions they themselves have made for the maintenance of pension funds after the Respondent unlawfully discontinued contributions to those funds, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall order the Respondent to make the unit employees whole, with interest, for any loss they may have suffered by reason of the Respondent's unlawful failure and refusal to pay the employees holiday pay for the day after Thanksgiving and the day before Christmas, tool allowances, weekly sick benefits, and personal and earned vacation pay as required by the agreement. All backpay and allowances due under this Order shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

We shall order the Respondent to reimburse the Union for all union dues which the Respondent has failed to deduct from employees and remit to the Union pursuant to the agreement, with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.⁵

We shall order the Respondent to abide by and comply with the grievance and arbitration provisions set forth in the agreement, and to deduct money designated by employees for IRA contributions and remit those moneys to the designated bank, as required by the agreement.

³ Because the provisions of pension plan fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

⁴ *Kraft Plumbing & Heating*, 252 NLRB 891 (1980).

⁵ As the record does not reveal whether the employees otherwise continued to tender dues to the Union apart from the checkoff mechanism, we shall leave the determination of the amounts actually lost by the Union, if any, to the compliance stage of these proceedings. See, e.g., *Cummins Component Plant*, 259 NLRB 456 (1981). Reimbursement will be ordered only with respect to those employees who authorized that their dues be checked off and tendered to the Union under the terms of the collective-bargaining agreement.

We shall order the Respondent to rescind its unilaterally established starting time for employees and penalties for tardiness, personnel manual, and requirement that prospective employees sign, as a condition of hire, a form titled Specific Conditions for Employment.

ORDER

The National Labor Relations Board orders that the Respondent, Toombs Truck & Equipment Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Union of Operating Engineers, Local 18, AFL-CIO-CLC, as the exclusive bargaining representative of the employees in the unit of:

All mechanics, helpers, and partsmen employed by [the Respondent] at its 1800 Walcutt Street, Columbus, Ohio facility excluding all office clerical employees, guards and supervisors as defined in the Act, and all part-time high school student workers,

by failing and refusing to adhere to the terms of the May 30, 1988-April 30, 1991 collective-bargaining agreement, including (1) failing and refusing to pay (i) contributions to the Central Pension Fund of the Union pursuant to section 18.2 of the agreement, (ii) holiday pay for the day after Thanksgiving and the day before Christmas, pursuant to section 15.1 of the agreement, (iii) a tool allowance, pursuant to section 10.8 of the agreement, (iv) weekly sick benefits as required by section 17.3 of the agreement, and (v) personal and earned vacation pay as required by articles 15.1 and 16.3 of the agreement, respectively; (2) by failing and refusing (i) to abide by and comply with the grievance and arbitration provisions set forth in article 8 of the agreement, (ii) to deduct money designated by employees for IRA contributions and remitting those moneys to the designated bank, as required by section 18.1 of the agreement, and (iii) to deduct and remit dues to the Union pursuant to article 3 of the agreement; (3) by unilaterally, and without providing the Union with advance notice and or an opportunity to bargain, promulgating (i) a policy establishing a starting time for employees and penalties for tardiness, (ii) a personnel manual establishing policies with respect to wages, hours, vacations, holidays, insurance, discipline, substance abuse, and other terms and conditions of employment of employees in the unit, and (iii) a requirement that prospective employees sign, as a condition of hire, a form titled Specific Conditions for Employment, agreeing to observe specific rules,

regulations, and conditions of employment; and (4) by demanding that the Union agree to submit to a poll to establish its majority status, as a condition of negotiating a new collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit all amounts owed, with interest, in the manner set forth in the remedy section, to make the employees whole for loss of moneys or benefits resulting from the Respondent's failure to pay pension fund contributions as required by the collective-bargaining agreement.

(b) Make its unit employees whole, with interest, for any loss they may have suffered by reason of the Respondent's unlawful failure and refusal, in violation of the agreement, to pay to the employees holiday pay for the day after Thanksgiving and the day before Christmas, tool allowances, weekly sick benefits, and personal and earned vacation pay in the manner set forth in the remedy section.

(c) Reimburse the Union for all authorized union dues which the Respondent has failed to deduct and remit to the Union pursuant to the agreement, with interest, in the manner set forth in the remedy section.

(d) Abide and comply with the grievance and arbitration provisions set forth in the agreement.

(e) Deduct money designated by employees for IRA contributions and remit those moneys to the designated bank, as required by the agreement.

(f) Rescind its policy promulgated about January 1, 1991, unilaterally establishing a starting time for employees and penalties for tardiness.

(g) Rescind its unilaterally established personnel manual promulgated about January 1, 1991.

(h) Remove from its files any references to any penalties imposed on employees pursuant to the unlawfully implemented policy establishing a starting time for employees and penalties for tardiness or the unlawfully implemented personnel manual, and also any forms signed by employees as a condition of hire in which they were required to agree to observe specific rules, regulations, and conditions of employment, and notify the employees in writing that this has been done and that any adverse action taken pursuant to either policy or the personnel manual will not be used as a basis for future personnel action against them.

(i) Preserve and, on request, make available to the Board or its agents, for examination and copying, any and all records necessary to determine the

amounts of money due and payable to its employees.

(j) Post at its facility in Columbus, Ohio, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to adhere to the terms of our May 30, 1988-April 30, 1991 collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to pay contributions to the Central Pension Fund of the Union as required by the agreement.

WE WILL NOT fail and refuse to pay holiday pay for the day after Thanksgiving and the day before Christmas, pursuant to the agreement.

WE WILL NOT fail and refuse to pay a tool allowance, pursuant to the agreement.

WE WILL NOT fail and refuse to pay weekly sick benefits as required by the agreement.

WE WILL NOT fail and refuse to pay personal and earned vacation pay as required by the agreement.

WE WILL NOT fail and refuse to abide by and comply with the grievance and arbitration provisions set forth in the agreement.

WE WILL NOT fail and refuse to deduct money designated by employees for IRA contributions and remit those moneys to the designated bank, as required by the agreement.

WE WILL NOT fail and refuse to deduct and remit authorized dues to the Union pursuant to the agreement.

WE WILL NOT require that prospective employees sign, as a condition of hire, a form by which they agree to observe specific rules, regulations, and conditions of employment.

WE WILL NOT demand that the Union submit to a poll to establish its majority status, as a condition of negotiating a new collective-bargaining agreement with us.

WE WILL remit all amounts owed, with interest, to make our employees whole for any loss of moneys or benefits resulting from our failure to pay pension fund contributions as required by the collective-bargaining agreement.

WE WILL make our employees whole, with interest, for any loss they may have suffered by reason of our failure and refusal to pay them holiday pay for the day after Thanksgiving and the day before Christmas, tool allowances, weekly sick benefits, and personal and earned vacation pay.

WE WILL reimburse the Union, with interest, for all authorized union dues which we failed to deduct and remit to the Union pursuant to the collective-bargaining agreement.

WE WILL abide and comply with the grievance and arbitration provisions set forth in the agreement.

WE WILL deduct money designated by the employees for IRA contributions and remit those moneys to the designated bank, as required by the agreement.

WE WILL rescind our policy unilaterally establishing a starting time for employees and penalties for tardiness.

WE WILL rescind our unilaterally established personnel manual.

WE WILL remove from our files any references to any penalties imposed on employees pursuant to the policy unilaterally establishing a starting time for employees and penalties for tardiness or the unilaterally promulgated personnel manual, and also any forms signed by employees as a condition of hire in which they were required to observe specific rules, regulations, and conditions of employment, and WE WILL notify any affected employees in writing that we have done so and that any adverse action taken pursuant to either policy or the personnel manual will not be used as a basis for future personnel action against them.

TOOMBS TRUCK & EQUIPMENT CO.